Supreme Court, U. S.
FILED
AUG 25 1980
MICHAEL RODAK, JR., CLERK

NO. 79 - 1764

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1980

* * *

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS,

Petitioner

V.

JOYCE ANN BURDINE,

Respondent

* * *

BRIEF FOR THE PETITIONER

* * *

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the defendant in a Title VII case must prove by a preponderance of the evidence that it relied on a nondiscriminatory reason in making a challenged employment decision or whether such defendant is merely required to articulate a nondiscriminatory reason for the decision which the plaintiff must prove to be pretextual.

2. Whether a finding of nondiscriminatory motive by a District Court should be upheld unless found to be clearly erroneous.

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BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 608 F.2d 563.

JURISDICTION

The opinion of the Court of Appeals was entered on December 17, 1979. A timely position for rehearing with a suggestion that the rehearing be en banc was denied on March 10, 1980.

The Petition for Certiorari was filed on May 6, 1980, and was granted on June 16, 1980.

This Court's jurisdiction is invoked under 26 U.S.C. §1254(1).

STATUTE INVOLVED

The statute involved is 42 U.S.C. §2000e, et. seq.

STATEMENT OF THE CASE

Respondent, Joyce Ann Burdine (Burdine), was hired by Petitioner, Texas Department of Community Affairs (TDCA) in January, 1972, as an accounting clerk in the Public Services Careers Division (PSC) (R 3, 4). She was promoted in July, 1972, to Field Services Coordinator (R 5). In early October, 1972, Mark Nealy, the Project Director of PSC, assigned Burdine additional duties (R 5). Nealy resigned in mid-October, 1972, and additional duties were assigned to Burdine in November, 1972, by Nealy's former supervisor, John Malone (R 6). After Nealy resigned, Burdine performed a coordinating role for the PSC project under Malone (R 90). She had some supervisory responsibility (R 91).

The United States Department of Labor (DOL) totally funded PSC (R 73); in February, 1973, DOL gave written notice to B.R. Fuller (Fuller), the Executive Director of TDCA, that the PSC program would be terminated at the end of March, 1973, because of certain inadequacies (R 116, DX "A"). Fuller believed that part of the PSC program's problems with DOL could be attributed to Burdine in her coordinating and supervisory role (R 90, 91). These problems included: (1) lack of proper documentation of expenditures; (2) payments made on expired contracts; (3) inaccurate expenditure accruals; (4) inaccurate enrollee certifications; and (5) unqualified enrollees being allowed into programs (R 77, DX "A"). Fuller was able to convince DOL to continue funding the PSC program subject to certain conditions (R 116, DX "C"). DOL ordered the appointment of a permanent Project Director and a reorganization and reduction of staff (R 116, DX "C").

Fuller was also convinced that Burdine was partially responsible for a problem with dissension among the PSC staff (R 77, 83, 90, 91, 95). The District Court found that Burdine, Marian Kirkland and Roberto Carraveo

had disagreements and did not work well together (A-3). In her supervisory role, Burdine was, in Fuller's estimation, ultimately responsible for resolving communication and dissension problems among the staff (R 91, 95). When the PSC program was reorganized, Fuller terminated Burdine, Kirkland and Carraveo (R 87).

Fuller appointed Robert Watts (Watts), an experienced administrator with excellent credentials (R 79, 80), to fill the position of Project Director. Robert Walz (Walz) was promoted to the position of Project Coordinator (R 81). Walz was the only professional level employee retained in the PSC program (R 121, DX "F"). There was no evidence that Walz had any responsibility for the dissension problems in the PSC program or for any of the problems pointed out by DOL.

Burdine filed suit in the United States District Court for the Western District of Texas, Austin Division, against TDCA, alleging that she had been discriminated against on the basis of sex in violation of 42 U.S.C. §2000e, et. seq. After a trial to the Court, the District Court ruled on December 8, 1976, that TDCA had not acted with discriminatory intent in terminating Burdine while hiring Watts and retaining and promoting Walz.

The United States Court of Appeals for the Fifth Circuit in its opinion of December 17, 1979, affirmed the District Court's ruling that there had been no discrimination in the decision to hire Watts, rather than Burdine, for the position of Project Director. However, the Court of Appeals reversed the District Court's finding of no discrimination insofar as it applied to the termination of Burdine and retention and promotion of Walz. The Court of Appeals ruled that TDCA had failed to prove by a preponderance of the evidence that it had relied on nondiscriminatory reasons in making the decision to retain and promote Walz while terminating Burdine.

TDCA then filed a petition for rehearing (with the suggestion that the rehearing be en banc) with the Court of Appeals; the petition was overruled on March 10, 1980, and review was then sought in this Court.

SUMMARY OF ARGUMENT

1. TDCA articulated several legitimate, nondiscriminatory reasons for terminating Burdine while retaining and promoting Walz; thereby rebutting Burdine's prima facie case. Burdine did not introduce evidence which would indicate that the reasons articulated were pretextual and, consequently, Burdine failed to satisfy her burden of proof.

2. The finding by the District Court that the decision to terminate Burdine while retaining and promoting Walz was not based on considerations of sex, was not clearly erroneous, and should be affirmed.

ARGUMENT

I.

This Court established the framework for considering a Title VII case in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that framework, a plaintiff establishes a prima facie case by proving that he belongs to a class protected by Title VII, that he applied for and was qualified for a job for which the employer was seeking applicants, and that he was rejected and the employer continued to seek applicants among persons having the plaintiff's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Once the plaintiff establishes a prima facie case the burden shifts to the defendant to merely articulate or state a legitimate, nondiscriminatory reason for the challenged personnel decision. *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978). The defendant's burden is not a burden to persuade the trier that he was in fact motivated by the articulated reason and not a

discriminatory one. Rather, it is merely a burden of production. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1011 (1st Cir. 1979).

When the defendant has articulated a legitimate reason for his personnel decision, it becomes the plaintiff's burden to show that the reason so articulated is merely pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

To require the defendant, as the Court of Appeals has in this case, to prove its reliance on a legitimate reason by a preponderance of the evidence would make the third step of the *McDonnell Douglas'* test superfluous. *Board of Trustees v. Sweeney*, 439 U.S. 24, fn. 1 (1978). In *Sweeney* the Court of Appeals had required the defendant to prove absence of discriminatory motive; the Court of Appeals in this case has, in effect, imposed the same burden on TDCA, since the only way to prove absence of discriminatory motive is to show reliance on legitimate reasons.

> If a defendant were to *prove* that he was motivated by a legitimate reason, there would be no room left for showing that reason was a "pretext", as a pretext is "a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs." Webster's Third New International Dictionary (1971). To say, as the court did here that the defendant must prove that its action *was* based on a legitimate reason *and* that the plaintiff must "then" prove that it was not, is contradictory. *Loeb v. Textron, Inc.*,, 600 F.2d 1003, 1012 (1st Cir. 1979).

The *McDonnell Douglas* framework assures that the burden of proving discrimination remains at all times with the plaintiff. Because direct evidence of discriminatory intent is difficult to produce in court and

because an employer has the best access to the reasons for his decision, an inference sufficient to support a prima facie case will arise once the plaintiff has established that the challenged decision was not based on the two most common nondiscriminatory reasons, i.e. lack of qualifications or absence of a vacancy in the job sought. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 fn. 44 (1977).

Clearly, there are a multitude of other legitimate reasons that could support a decision to reject the plaintiff. A "prima facie showing is not the equivalent of a factual finding of discrimination." *Furnco Construction Co. v. Waters*, 438 U.S. 567, 579 (1978). *McDonnell Douglas* merely prevents the defendant from taking advantage of the difficulties a plaintiff would face in proving discrimination by "stonewalling" and leaving the plaintiff to his proof. When the plaintiff establishes that he was not rejected for the two most common legitimate reasons, he effectively "smokes out" the defendant, who must then come forward and articulate or state what his legitimate reasons were. At that point, the plaintiff can direct his attack at disproving those purported reasons by showing them to be pretextual. *McDonnell Douglas* does nothing more than require the defendant to state a legitimate reason -- it remains the plaintiff's burden to prove discrimination by showing that the reason articulated was not the true reason for the decision. *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978), *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979); *Kirby v. Colony Furniture Company, Inc.*, 613 F.2d 696 (8th Cir. 1980); *Ambush v. Montgomery County Government*, ____ F.2d ____ ; 22 FEP 1101; 23 EPD, Para. 30,901 (4th Cir. 1980).

Assuming, arguendo, that Burdine established a prima facie case, TDCA articulated several legitimate, nondiscriminatory reasons for terminating Burdine while retaining and promoting Walz. TDCA, thereby, rebutted Burdine's prima facie case while she offered no

evidence that the reasons articulated by TDCA were pretextual.

TDCA articulated the following reasons for terminating Burdine while retaining and promoting Walz. Fuller testified that in her coordinating and supervisory role, Burdine was at least partially responsible for serious problems in the PSC program pointed out by DOL, including (1) lack of documentation of expenditures; (2) payments made on expired contracts; (3) inaccurate expenditure accruals; (4) inaccurate enrollee certifications; and (5) unqualified enrollees being allowed into programs. Fuller also testified that Burdine was partially responsible for some dissension within the PSC program.

Burdine was unable to rebut Fuller's testimony that she bore partial responsibility for problems in the PSC program pointed out by DOL and for dissension in the program. There was no contention by Burdine that Walz was not qualified for the Project Coordinator position. There was no evidence that Walz was involved in the dissension within the PSC program or that he was in any way responsible for the problems with the program pointed out by DOL. In short, TDCA articulated several legitimate, nondiscriminatory reasons for its decision, and Burdine was unable to prove the reasons articulated were pretextual. Burdine did not satisfy her burden of proof.

II.

Even if Burdine's prima facie case had not been rebutted by TDCA, the District Court still could have concluded that Burdine failed to satisfy her burden of proving discrimination. A "prima facie showing is not the equivalent of a factual finding of discrimination." *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978). A prima facie case permits an inference of discrimination -- it does not compel it. It is comparable to the inference that arises from a finding of res ipsa

loquitur. See e.g. *Kelly v. American Airlines, Inc.*, 508 F.2d 1379 (5th Cir. 1975).

The existence or non-existence of discrimination for Title VII purposes, particularly in a disparate treatment case, is predominately a question of fact and should be reviewed under a clearly erroneous standard as provided by Rule 52(a), Federal Rules of Civil Procedure. *Sweeney v. Board of Trustees*, 604 F.2d 106 (1st Cir. 1979) *cert. denied*, ____ U.S. ____, 100 S.Ct. 733 (1980). Such a determination is made by the trial judge based upon:

> "reasonable inferences drawn from the totality of facts, the conglomerate of activities, and the entire web of circumstances presented by the evidence on the record as a whole." *Slack v. Havens*, 522 F.2d 1091 (9th Cir. 1975) citing *Aeronca Manufacturing Co. v. NLRB*, 385 F.2d 724, 728 (9th Cir. 1967).

After weighing the evidence and assessing the reliability of the witnesses the District Court concluded that TDCA's decision to terminate Burdine while retaining and promoting Walz was not based either in whole or in part on consideration of sex. This finding of fact was not clearly erroneous and should have been affirmed by the Court of Appeals.

There was substantial evidence in the record to support the District Court's conclusion, in particular the testimony of Fuller that he considered Burdine to be partially responsible for the failures in the PSC program pointed out by DOL and also for some dissension within the program. Since there was substantial evidence to support the District Court's conclusion, it was not clearly erroneous.

Two Circuit courts of appeals have concluded that a finding on discrimination may be reversed, although

not clearly erroneous. *Causey v. Ford Motor Company*, 516 F.2d 416 (5th Cir. 1975), *Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976), *cert. denied*, 443 U.S. 919 (1977). However persuasive the reasoning of those cases may be in disparate impact cases, it is inapplicable to a disparate treatment case. Finding the motivation for a particular personnel decision is the classic type of factual determination that district courts make on a daily basis. *See*, e.g. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). Such a determination is not comparable to a finding of infringement of a patent or a finding that a gain should be treated as capital or ordinary for income tax purposes. *Causey v. Ford Motor Company*, 516 F.2d 416 (5th Cir. 1975). It should only be reversed if found to be clearly erroneous.

CONCLUSION

For the reasons stated herein, TDCA respectfully prays that the judgment of the United States Court of Appeals for the Fifth Circuit, holding that TDCA discriminated against Burdine on the basis of her sex when it terminated her while retaining and promoting Walz, be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that three true and correct copies of the foregoing Brief of the Petitioner has been served upon the attorney for Respondent by placing same in the United States Mail, certified, return receipt requested, addressed to Mr. Hubert L. Gill, P.O. Box 777, Austin, Texas 78767, on this the _____ day of July, 1980.

LONNY F. ZWIENER